SUPREME COURT, U.S.
FILED
NOV 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-6109

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FREDERICK MATHEWS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

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(Appointed by this Court)
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LAW REVIEW ARTICLE

Note, *Pleading the Entrapment Defense: The Propriety of Inconsistency*, 28 N.Y. L. Sch. L. Rev. 1025 (1983) 3

SUMMARY OF REPLY ARGUMENT

I. In its search for truth, the jury should have available to it all evidence bearing upon the guilt or innocence of the accused. It is not inconsistent for a defendant to assert his innocence and yet claim entrapment. He could argue that he had not formed the subjective criminal intent necessary to find him guilty of the offense, and argue alternatively that if the jury found sufficient objective indicia of his criminal intent, the offense was the product of the government's creative activity.

II. The question of whether the record contains sufficient evidence to entitle Mr. Mathews to an entrapment instruction is not squarely before this Court. Nevertheless, the record clearly establishes that DeShazer induced Mathews to commit the offense by playing upon Mathews' dire financial circumstances and DeShazer's own dilemma of explaining a large sum of money to his wife. There is no evidence that Mathews was predisposed to commit the offense. Although Mathews had previously borrowed money from DeShazer, nothing in the record demonstrates that either party believed those exchanges were anything but personal loans. Thus, the government failed to prove beyond a reasonable doubt that Mathews was predisposed to commit the offense.

REPLY ARGUMENT

I. DETERMINATION OF WHETHER A DEFENDANT WAS ENTRAPPED, LIKE THE DETERMINATION OF WHETHER THE DEFENDANT IS GUILTY OR INNOCENT, IS A QUESTION FOR THE JURY.

Contrary to all of this Court's precedent, the government argues that the defendant who claims he was entrapped but denies having the intent to commit the offense is somehow gaining a windfall if the jury adopts the entrapment defense. That view assumes that the defendant is guilty but is allowed to go free because of the government's overreaching. It is on that basis that some circuits require the defendant to first admit his guilt before he can claim entrapment.

This court has long held, however, that the entrapment defense is not in the nature of a confession and avoidance. The *Sorrells* Court expressly held that "This . . . is a misconception. The defense is available, not in the view that the accused though guilty may go free, but that the government cannot be permitted to contend that he is guilty of a crime where the government officials are the instigators of his conduct." *Sorrells* v. *United States*, 287 U.S. 435, 452 (1932). Very simply, *there is no crime* if the defendant's conduct is found to be the product of entrapment.

In that light, there is no impermissible inconsistency in submitting to a jury both the claim that the defendant lacked the intent to commit the offense and the claim that the defendant was entrapped. *Sorrells*, 287 U.S. at 452. The defendant may logically assert that although he committed certain acts comprising the elements of the offense, he had not formed the intent necessary to transform those actions from innocent conduct to a criminal offense. At the same time, the defendant may claim that if the jury concludes from all of the evidence that he did have the required criminal intent, he did so at the government's instigation.

The well-established fundamental premise of the entrapment defense is "the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a prescribed offense but was induced to commit them by the government." *United States* v. *Russell*, 411 U.S. 423, 435 (1973). The government interprets that language as requiring the defendant to admit all elements of the crime. The government's reliance is without foundation in the law: nothing in this Court' decisions requires a defendant to admit any elements of the offense before he may claim entrapment. On the contrary, this court expressly leaves such matters to the jury. *Sherman* v. *United States*, 356 U.S. 369, 377 (1958). In any given case there exists the very real possibility that the government may have succeeded in creating the circumstantial, objective appearance of intent, without

having actually implanted the criminal design in the defendant's subjective mind. On that premise, a defense of both innocence and entrapment is not only entirely logical and consistent, but best serves the criminal trial's function as a "search for truth." *Nix* v. *Whiteside*, No. 84-1321, slip op. at 8 (Feb. 26, 1986)

In Mr. Mathews' case, it is entirely consistent for him to admit that he received money from Mr. DeShazer, acknowledge that DeShazer was his client at the Small Business Administration, but deny that he took the money with the intent that it would affect Mathews' handling of DeShazer's SBA matters. Intent, for purposes of submission to the jury, was established purely through DeShazer's juxtaposition of discussions about SBA matters with talk about the loan he was offering to Mathews, or even through the physical transfer of money. Mathews denied that he would have ever taken the money if it had been offered in relation to his SBA work. His denial constitutes a denial of the intent element of the offense. Yet he could have argued to the jury that if in fact the jury decided that Mathews had formed the criminal intent essential to a finding of guilt, the jury should consider whether that intent, as well as the physical act, was induced by DeShazer acting as a government agent.

While the government acknowledges, as it must, that a criminal jury trial is a search for the truth, *e.g.*, *United States* v. *Greenfield*, 554 F.2d 179, 182 (5th Cir. 1977), its view would preclude criminal defendants from presenting to the jury a significant portion of the evidence in a given case. "[T]he inconsistency rule subverts the truth-seeking function of the trial by unreasonably requiring a defendant to present to the jury only what *he* believes to be the most credible set of facts available. In large part, the jury is thereby deprived of the benefit of viewing the bases for the accused's indictment in their entirety." Note, *Pleading the Entrapment Defense: The Propriety of Inconsistency*, 28 N.Y.L. Sch. L. Rev. 1025, 1074 (1983) (emphasis in original). Whether a defendant has been

entrapped is a jury question, "as part of its function of determining the guilt or innocence of the accused." *Sherman* v. *United States*, 356 U.S. 369, 377 (1958). Once inducement, the factual predicate for an entrapment claim, is established, "non-entrapment" is simply an additional element which the prosecution must prove. *United States* v. *Demma*, 513 F.2d 981, 983 n.2 (9th Cir. 1975)(citing *Sorrells*, 287 U.S. at 448). The prosecution accomplishes this by proving predisposition. These entrapment issues cannot be removed from the jury's consideration, simply because a defendant contests another element of the government's proof.

The government and a minority of this Court have repeatedly urged the implementation of an objective legal standard for when a criminal defendant may claim the entrapment defense. *United States* v. *Russell*, 411 U.S. 423, 441 (1973) (Stewart, J., dissenting); *Sherman*, 356 U.S. at 384-85 (Frankfurter, J., concurring); *Sorrells*, 287 U.S. at 453, 457 (Roberts, J., concurring). Under that view, the trial judge, not the jury, should decide whether the government's conduct was lawful. *Russell*, 411 U.S. at 441 (Stewart, J., dissenting). This Court has soundly rejected that approach, holding that the entrapment determination is a jury issue. *See Russell*, 411 U.S. at 433-34.

Mathews was improperly denied the opportunity to have the jury consider his entrapment issue, solely because he refused to admit that he was guilty of the offense. The jury should have been allowed to decide whether Mathews committed the substantive elements of the crime and if so, whether the government implanted the criminal design.

As alternative defenses, those two claims are logically consistent. A defendant can consistently claim that, subjectively, the government never succeeded in implanting the criminal intent in his mind. But if the jury finds, from the objective facts before it, that the government successfully implanted the criminal design, the intent certainly would have existed, and the jury is required to move to the issue of whether the govern-

ment's proof was obtained through impermissible "creative activity." *Sorrells*, 287 U.S. at 451.

On the other hand, if the evidence created a circumstantial perception that Mathews had the requisite intent (*i.e.*, he took money from someone who was his client and for whom he was supposed to process various documents), the government may not have successfully transferred the *mens rea* to Mathews.

> To have induced the underlying activity is not necessarily to have induced a particular state of mind, because the activity may reflect any of several different motives. The significant point is that to claim entrapment is to claim that the government induced the acts necessary to constitute the crime charged, whether or not the government also induced the requisite state of mind.

Demma, 523 F.2d at 984 n.2. Nevertheless, the jury logically could find that although Mathews claims an innocent state of mind, the circumstantial evidence of intent was sufficient to persuade the jury that he did have *mens rea*. Given the entrapment defense, the jury also could find that the intent, as well as the physical acts, were the government's creation.

When, as in this case, the testimony and other evidence can arguably support claims of both innocence and entrapment, the jury should be allowed to decide both issues. *See Sherman*, 356 U.S. at 377. Indeed, trial courts *must* instruct the jury on the defendant's defense theory where the record contains *any* evidentiary foundation for the theory, even if the evidence is "weak, insufficient, inconsistent, or of doubtful credibility." *United States* v. *Timberlake*, 559 F.2d 1375, 1379 (5th Cir. 1977).

There is no dispute that "[a] criminal prosecution . . . is not a game." *United States* v. *Rey*, 706 F.2d 145, 147 (5th Cir. 1983). It is irrefutably a serious matter with the potential to permanently affect the course of a defendant's life. A defendant should not be foreclosed from presenting those defenses and allowing the jury to choose. Because there are instances when alternative defenses can be supported by the evidence, if the

jury finds the defenses are factually and logically incompatible, the defendant is the one who takes the risk and bears the brunt of any resulting diminution in credibility. *United States* v. *Kelly*, 748 F.2d 691, 701 n.1 (D.C. Cir. 1984) ("[w]hen [defendant] chose to give testimony at odds with the entrapment defense, he ran the risk of undercutting his own case."); *Demma*, 523 F.2d at 984. "[S]imultaneous denial of criminal intent and advancement of an entrapment theory almost always will damage the likelihood of success of such defense." *United States* v. *Nations*, 764 F.2d 1073, 1081 (5th Cir. 1985).

Permitting the defendant to claim entrapment while he denies guilt is entirely consistent with this Court's view of the entrapment defense. Because Mr. Mathews was denied the opportunity to present both alternative defenses to the jury, his right to a fair trial, with the jury receiving all relevant evidence and instructions, was denied. Reversal is therefore mandated.

II. THE EVIDENCE AT TRIAL DEMONSTRATED SUFFICIENT GOVERNMENT INDUCEMENT TO WARRANT AN ENTRAPMENT INSTRUCTION.

The government erroneously states that two independent reasons supported the lower courts' decisions denying Mr. Mathews the use of the entrapment defense. In fact, the lower courts based their decisions entirely upon the Seventh Circuit Court of Appeals' rule that a defendant who wishes to claim entrapment must first admit that he committed all of the physical acts and had the necessary criminal intent. (J.A. 3-4, 131). *E.g.*, *United States* v. *Rogers*, 755 F.2d 533, 550 (7th Cir. 1985); *United States* v. *Johnston*, 426 F.2d 112, 114 (7th Cir. 1970), *cert. denied*, 401 U.S. 921 (1971). The trial court expressly declined to address the sufficiency of the evidence. (J.A. 131). The government argues extensively that the trial record contains no evidentiary support for the entrapment defense. Although this issue is not squarely before the court, it is easily resolved by reference to the trial record and the law.

Before the entrapment defense can be claimed, the evidence must indicate government inducement to commit the offense. *Russell*, 411 U.S. at 433; *Demma*, 523 F.2d at 984. Inducement requires a showing of more than a government agent's "simple request" to engage in a criminal activity, *Casey* v. *United States*, 276 U.S. 413, 419 (1928), but can be established, as the government acknowledges, by a showing of "persuasion or mild coercion" or by "pleas based on need, sympathy or friendship." *United States* v. *Jackson*, 700 F.2d 181, 191 (5th Cir. 1983).

In *United States* v. *Nations*, 764 F.2d 1073 (5th Cir. 1985), the court held that sufficient evidence of government inducement was presented to allow the defendant to present the entrapment claim to the jury. *Id.* at 1080. The informant, who was the defendant's former brother-in-law and who admitted he had a vendetta against the defendant, *id.* at 1074, "engaged [the defendant's] cooperation with a tale of financial woes, the need to support a new spouse, and terminal cancer, all the while knowing that [the defendant's] sister recently had died of cancer." *Id.* at 1080.

Similar evidence of inducement exists in the instant case. Mathews and DeShazer had been friends for a number of years, confiding in each other about a variety of personal concerns. (J.A. 9, 101, 106, 117-8; R. 38: 434-35). In December 1984 and January 1985 DeShazer was "a desperate man" and blamed Mathews because he was not meeting his defense department contracts. (J.A. 95). DeShazer knew that Mathews was about to lose his job, that Mathews' wife had left him, that Mathews had attorney fees to pay, and that Mathews had significant household expenses. (J.A. 121-22). DeShazer told Mathews a fictitious story about a friend loaning him $12,000.00, that he needed $7,000.00 for mortgage payments, that he did not want his wife to find out about the total amount because it could lead to another divorce, and that therefore he would loan the difference to Mathews. (J.A. 81, 99, 121-22). He played on Mathews' dire financial and employment circumstances, and talked about not wanting another divorce when he knew Mathews'

wife had just left him. And he repeated the offer over a period of two months. (J.A. 23, 35-36, 67-69, 121-25).

Thus, the evidence presented provided a more than adequate "basis for a reasonable doubt on the ultimate jury entrapment issue of whether criminal intent originated with the government." *Nations*, 764 F.2d at 1080. In such cases, where the record contains sufficient evidence to submit the entrapment issue to the jury, "the district court must instruct the jury to acquit unless the evidence proves beyond a reasonable doubt that the defendant was predisposed—that the criminal intent originated with the defendant." *Id.*

Predisposition can be established by a defendant's "ready complaisance" to comply with the government agent's suggestion of criminal activity. *Sherman*, 356 U.S. at 375. The government argued in *Sherman* that the defendant's two prior convictions demonstrated his predisposition. As in *Sherman*, however, there is ample evidence in this case to support the claim that the defendant was not predisposed. Mathews had previously taken money from DeShazer, but according to Mathews, it was always deemed a personal loan with no connection to Mathews' duties at the SBA. There was no indication that *either* party, at the time of the earlier loans, believed that the prior transactions were anything other than personal loans. As for the loan upon which the instant offense is based, the evidence clearly establishes that DeShazer, not Mathews, had to repeatedly initiate conversations about the loan. The evidence further showed that on February 28, 1985, when DeShazer suggested the subject loan, Mathews had not requested any loans since July, 1984. At the very least, Mathews' own testimony raised the issue of inducement and lack or predisposition. The jury should have been permitted to consider this in the light of the law of entrapment.

If lack of predisposition is an essential factor to be established before a defendant may claim entrapment, then the concommitant premise is that the government must prove beyond a reasonable doubt that the defendant was predisposed to commit the offense. *See Hampton* v. *United States*, 425 U.S.

484, 489 (1976); *Nations*, 764 F.2d at 1080; *United States* v. *Rhodes*, 713 F.2d 463, 467 (9th Cir.), *cert. denied*, 466 U.S. 1012 (1983). If entrapment is established, there is no crime. *Sorrells*, 287 U.S. at 452. Therefore, when inducement is raised by trial evidence, non-entrapment is an element of every crime.

It is not for this Court, however—or indeed for any entity but the jury—to decide whether the evidence established that Mathews was or was not predisposed to commit the offense. As discussed earlier, the issue of guilt and the issue of entrapment are both issues for the jury.

In this case, despite a more than adequate evidentiary foundation, the jury was never allowed to decide the entrapment issue because Mathews refused to admit that he was guilty. The issue presented for review is whether a defendant should be allowed to claim entrapment when he denies possessing the requisite criminal intent. Resolution of that issue renders unnecessary the Court's analysis of whether the record below included enough evidence to permit the defendant to claim entrapment.

CONCLUSION

As stated in his original brief, Frederick Mathews respectfully urges this Court to reverse his conviction and grant him a new trial with the ability to claim the entrapment defense without forfeiting his constitutional rights to remain silent, to refrain from incriminating himself, and to require the government to prove every element of the offense charged beyond a reasonable doubt. In so doing, this Court will eliminate a longstanding dichotomy in the circuits while reiterating and clarifying its well-established holdings on the entrapment defense.

Respectfully submitted,

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